IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.501 OF 2004

1.Ashok Tatyasaheb Kallanawar
2.Sau.Apurva Ashok Kallanawar
3.Sau.Prabhavati Tatyasaheb Kallanwar ...Petitioners

vs.

Shrenik Bansilal Kotecha ...Respondent

Mr.N.J.Patel for the Petitioners
Mr.Umesh Mankapure for the Respondent.

CORAM: A.S.OKA,J.
DATE OF HEARING LAST ARGUMENTS : 4TH MAY 2007
DATE OF PRONOUNCEMENT OF JUDGMENT : 4TH JUNE 2007

JUDGMENT:

1. The submissions of the Advocates appearing for the parties were heard on 27th April 2007 and 30th April 2007. The Writ Petition was kept on 3rd May 2007 for Judgment. On 3rd May 2007, further submissions were permitted to be advanced and the Writ Petition was kept on 4th May 2007. On that day by way of indulgence, the Advocate for the Petitioner sought permission to advance further arguments. The said request was acceded to. As 4th May 2007 was the last working day before the summer vacation, the judgment could not be dictated and therefore, the same was reserved.

2. The Petitioners are the original Plaintiffs. The Petitioners filed a suit in the Court of Civil Judge Senior Division, Kolhapur for mandatory injunction directing the Respondent to deliver the possession of the suit property.

The Petitioners also prayed for a money decree in the sum of Rs.2,48,535/- towards arrears of premium and interest thereon. A prayer was also made for a decree as regards payment of electricity and water charges.

3. The case of the Petitioners is that they are the owners of the building on land bearing C.T.S.No.245-K-1 of Tarabai Park, Kolhapur. The name of the building is Bank House. The suit property is the premises admeasuring 155.37 sq.meters on the first floor of the said building. According to the Petitioners, by an agreement of leave and licence executed on 1st December 1998, the Petitioners allowed the Respondent to use the suit premises for running 'Internet Cafe and Pool'. The monthly premium was fixed at Rs.13,500/-. Over and above monthly premium, the Respondent agreed to pay water charges as well as property taxes along with electricity charges in respect of the suit premises. According to the Petitioners, the Respondent agreed to increase the amount of the premium with effect from 1st December 1999. As the premium was not paid by the Respondent, a legal notice was issued by the Petitioners on 21st July 2000 which was replied by the Respondent. As the Respondent did not pay the premium amount and other amounts due and payable under the leave and licence agreement, the suit was filed by the Petitioners in the Court of the Civil Judge (S.D.) at Kolhapur.

4. The Respondent made an Application for invoking Rule 11 of Order VII of the Code of Civil Procedure,1908 contending that the suit was not maintainable in the Civil Court and in fact an Application ought to have been filed before the competent Authority established under the Bombay Rents, Hotel and Lodging Houses Rates (Control) Act, 1947 (hereinafter referred to as the said Act of 1947). In the alternative, it was contended that the suit will be governed by the said Act of 1947 and therefore, the same ought to have been filed in the Court of Civil Judge, Junior Division. The said Application was decided by the learned Trial Judge by order dated 18th June 2002. The learned Judge held that the suit will be governed by section 28 of the said Act of 1947 and therefore, the suit ought to have been filed in the Court of Civil Judge, Junior Division. By the said order, the learned Trial Judge rejected the plaint under Order VII Rule 11 of the said Code. An application for review was made by the Petitioners which has been rejected by order dated 12th August 2003 which is impugned in this Petition under Article 227 of Constitution of India.

5. The learned Counsel appearing for the Petitioners submitted that the suit premises are situated at Kolhapur and in view of section 28 of the said Act of 1947, the Court of the Civil Judge Senior Division, Kolhapur is the only competent Court having jurisdiction to decide the suit. He

submitted that the suit was filed in the proper Court having jurisdiction. He submitted that in any event the plaint could not have been rejected and at the most it could have been returned for presentation to the proper court. He submitted that there was an error apparent on the face of the record and it was a fit case for reviewing the earlier order. The learned Counsel for the Respondent invited my attention to the findings recorded by the learned Trial Judge in both the aforesaid orders and submitted that no interference is called for.

6. It is well settled position of law that the issue of jurisdiction has to be decided on the basis of averments made in the plaint and the averments made in the written statement are of no consequence. As per the averments made in the plaint, the agreement of leave and licence was executed in respect of the suit premises for non residential use i.e. for running internet Cafe and Pool and the licence is not for residential purpose. It must be borne in mind that the said Act of 1947 was repealed by the Maharashtra Rent Control Act,1999 (hereinafter referred to as the said Act of 1999) which came into force with effect from 31st March 2000. Even assuming that the said Act of 1947 was applicable, under section 28 of the said Act of 1947, the suit filed by the Licensor for possession of the premises given on licence was not at all covered. By 1987 amendment to the said Act of

1947, a Competent Authority was established for entertaining an application for eviction by the landlord against the licensee in respect of the premises given on licence only for residential use. The suit was not at all governed by section 28 of the said Act of 1947 as the section 28 did not cover a suit for possession by a landlord against his licensee. Obviously, the licence being for non-residential purpose, a remedy of approaching the competent authority under the said Act of 1947 was not available to the Petitioners. Therefore, the suit was under general law i.e. under the Specific Relief Act,1963 and the claim in the suit being above Rs.1,00,000/-, the suit was maintainable in the Court of Civil Judge, Senior Division.

7.Even going by the provisions of the said Act of 1999, section 33 thereof is in pari materia with section 28 of the said Act of 1947. Section 33 does not cover a suit for possession by a landlord/licensor in respect of the premises given on licence.

8. Under section 24 of the said Act of 1999, a landlord is entitled to recover the possession of the premises given on licence on its expiry by making an Application before the competent Authority. Under section 41 of the said Act of 1999, a landlord within the meaning of section 24 has been defined as a person who has given premises on licence for residence or his successor-in-interest. Thus, section 24 of

the said Act of 1999 will not apply in the present case.

9. Net result of the discussion is that the orders passed by the learned Trial Judge show complete non application of mind. While passing the order of rejection of the plaint, the learned Trial Judge has proceeded on erroneous assumption that the suit is governed by the said Act of 1947. Even otherwise, the view taken by the learned trial Judge is wrong as for the city of Kolhapur, there is no post of the Civil Judge Junior Division and the Principal Court is of the Civil Judge, Senior Division. However, there are joint Civil Judges, Junior Division. Therefore, even assuming that the suit was governed either by the said Act of 1947 or by the said Act of 1999, the court of the learned Civil Judge Senior Division was the court having jurisdiction. Apart from this, even if the learned Judge was of the view that the some other court is having jurisdiction to entertain the suit, proper course would have been to return the plaint for presentation to proper court.

10. Therefore, this was a fit case for entertaining the application for review as there was an error apparent on the face of the record while passing the order dated 18th June 2002. It was obvious that the suit was instituted in the proper court having a jurisdiction to entertain and decide the same. The issue whether the Respondent is a licensee or tenant will have to be decided after the parties lead

evidence. Hence, the Petition must succeed.

11. Hence, I pass the following order :

i) Impugned Judgment and order dated 12th August 2003 is quashed and set aside and the Review Application No.162 of 2002 is hereby allowed.

ii) The order dated 18th June 2002 passed by the learned Trial Judge is quashed and set aside and the Special Civil Suit No.78 of 2001 is restored to the file.

iii) The learned Trial Judge will proceed to decide the suit in accordance with law.

iv) The suit shall be decided expeditiously.

v) Rule is made absolute in above terms with no order as to costs.

JUDGE